



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

May 28, 2021

OFFICE OF
GENERAL COUNSEL

Mr. James McCrystal
(by email to (b) (6))

RE: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

I am writing in response to a request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) so that you can be detailed on a part-time basis from your position as Senior Business Analyst in the Drinking Water Program of the Arizona Department of Environmental Quality to the Environmental Protection Agency (EPA) under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.* The Drinking Water Protection Division, which is part of EPA's Office of Ground Water and Drinking Water in the Office of Water, and the State of Arizona mutually intend to enter into a one-year part-time IPA so that you can assist EPA in developing and implementing the SDWIS Modernization data system, a national web-based drinking water data system. Your anticipated work under the IPA may affect your employer, the State of Arizona, so a waiver is necessary. Please note that this waiver applies only to the ethical considerations associated with the assignment. The Office of General Counsel takes no position on the policy considerations of entering into a part-time IPA.

After careful consideration of the facts, I am granting you a waiver under 18 U.S.C. § 208(b)(1) for the IPA detail, even though the detail is on a part-time basis and you will be also performing duties for the State. As required, my staff consulted with the Office of Government Ethics, which did not object to the issuance of the waiver. Your appointing official in the Office of Water agrees to this waiver.

Federal laws regarding conflicts of interest are critical to maintaining public confidence in the integrity of the Agency's actions and to ensuring that its decision-making is not swayed by personal interests. A waiver of your imputed financial interest pursuant to § 208(b)(1) should only be granted when the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Set forth below is my application of federal law to the specific facts of your request.

The State of Arizona

The entity with which you have a conflict of interest under 18 U.S.C. § 208(a) is your employer of record, the State of Arizona (hereinafter "Arizona" or the "State"). EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes. Thus, like other states, Arizona, is directly regulated by EPA but also serves

as a co-regulator in carrying out our environmental mandate.

Your Roles As They Relate to the State of Arizona and the EPA

Your position of record is Senior Business Analyst in the Drinking Water Program in the Arizona Department of Environmental Quality (AZ DEQ). In this position, you are a Senior Business Analyst responsible for all the *ad hoc* reporting needs for the drinking water team, including metric creation, tool and application design and development. You also serve as the system administrator for the AZ SDWIS so you have established expertise that is of interest to EPA and the work of the IPA. You also work as a project lead on any data driven tasks as requested from within the AZ DEQ management team, from predictive analytics to large scale analysis.

During the period of time that you will be assigned to EPA (which will be 50% of your overall time), you will be assigned as the subject matter expert on the development and implementation of the SDWIS Modernization data system, a national web-based drinking water data system that will track compliance monitoring data, perform violation determinations, and track violations, compliance actions, and enforcement actions for drinking water programs nationwide. You will provide technical and programmatic advice to coordinate state comments for the development of the system. In this role, you will prioritize and make decisions about which items should be developed and make recommendations regarding the schedule for development and also make decisions on how to implement specific functions. You will be responsible for gathering input from state and EPA SDWIS Modernization data system users and demonstrating and discussing the system with them. You will also be expected to participate in SDWIS Modernization data system project management team meetings and to communicate about the project. During your detail, you will be expected to work with your own state and with other states. You and your supervisors have been advised and understand that, during the 50% of the time that you are not on the IPA working on behalf of EPA, you are prohibited from representing your State back to any federal official whatsoever.

The Legal Standard

EPA will reimburse Arizona for 50% of your current state salary in the amount of \$(b) (6). You will not be counted against the EPA employee ceiling.

Individuals detailed to EPA under an IPA are considered to be employees of their home institution “for all purposes except work and supervision,” *see* EPA’s IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. That said, you are also deemed an “employee” for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. *See* 5 C.F.R. § 2635.102(h) [defining “employee” as including “employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*”]. You are therefore prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you

have an imputed interest under 18 U.S.C. § 208. The statute is intended to prevent employees from allowing personal or imputed financial interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest. The fact that you have been detailed from the State does not render this prohibition inapplicable.

Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interests or those interests that are imputed to them.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of Arizona are imputed to you because you are their employee of record, and your continued employment and participation in Arizona's defined benefit plan are personal financial interests.¹ Absent a waiver from the imputed interest, you are prohibited from participating in any particular matter that affects Arizona's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

- (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes

¹ I note that you are not yet vested in the Arizona Retirement System's Tier 1 Noncontributory Plan, which is a defined benefit plan that provides full pension benefits at age 60 with 20 years of service. Pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflict of interest statute. See 5 C.F.R. § 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).

full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.

You seek a waiver under this provision.

Your Request for a Waiver

If granted, this waiver will permit you to perform the responsibilities EPA and Arizona authorize you to perform under the terms of the IPA itself.

Application of Applicable Law to Your Request for a Waiver and Decision

As EPA's Alternate Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision, I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which my staff has done.

In this situation, I conclude that your employment status with the State does present an imputed financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or applicable regulatory exemption. The statute's prohibitions are not absolute, however, and specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Alternate Designated Agency Ethics Official and, as such, have the authority to grant such a waiver.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you from now until the end of your IPA detail and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

Legal Analysis

As articulated in the statute itself and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee. In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and the State of Arizona are the "persons" whose financial interests are involved;
- You will be on a part-time IPA assignment from Arizona although EPA will

reimburse Arizona for 50% of your state salary and benefits on a quarterly billing basis;

- The disqualifying imputed financial interest arises from your employment status with Arizona, which raises the potential for gain or loss for the State as a result of government action that you may participate in as part of your EPA duties; and
- Your position as Senior Business Analyst in the Drinking Water Program in the Arizona Department of Environmental Quality involves your personal and substantial participation in particular matters that involve Arizona specifically, including decisions or recommendations about specific party matters;
- Arizona is directly regulated by EPA but also serves as a co-regulator in carrying out EPA's environmental mandate; and
- Both EPA and Arizona will specifically assign you to work on drinking water issues that may include that State.

I have considered these factors carefully, as well as the fact that you will not be participating personally and substantially in any particular matters at the EPA that would have a direct and predictable effect on your employment, salary or other benefits from the State, because none will come before you. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the State will be assigning you to work on drinking water-related issues that include the State. The "integrity of the services" that Arizona and EPA expect from you in your EPA position will be to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, Arizona will be recognizing that your EPA scope of work may entail working directly on particular matters that involve it but they are not expected to place any parameters on your ability to represent EPA's interests over theirs. There will be no limit on the performance of those duties even if those duties are not fully aligned with the interests of Arizona on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed financial interest in the State is not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Conclusion

Based on the factual circumstances of this request, including the expectations of the State and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

This waiver is limited in nature and permits only your official participation in particular matters that arise in the Office of Ground Water and Drinking Water that you would be

participating in as part of your assigned duties. You may work on particular matters of general applicability that affect Arizona as a member of a discrete and identifiable class because I have determined that doing so is not likely to affect your employment with the State or the ability or willingness of the State to meet its commitments under its defined benefit plan. But this waiver does not permit you to participate in any other particular matters, including particular matters involving specific parties in which Arizona is or represents a party. Furthermore, you are not permitted to represent Arizona or its interests back to EPA on SDWIS Modernization or any other matter. Another Arizona employee must be appointed to represent Arizona's interests. This waiver will cease to be effective when your IPA detail ends.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. While you are engaged in the IPA, you are representing only EPA's interests. You will be considered a federal employee subject to the federal conflict of interest laws for the entirety of the IPA, including the 50% of the time that you are assigned to work on State issues. You and your supervisors at the State and at EPA understand that you are bound by the criminal representational conflict of interest statute at 18 U.S.C. § 203 and cannot ever represent the interests of another, including Arizona, back to any official of the United States government (including EPA) while you are on this IPA. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to seek assistance promptly from Victoria Clarke, ethics attorney, the EPA Ethics Office at ethics@epa.gov, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

Sincerely,

Justina Fugh

Digitally signed by Justina
Fugh
Date: 2021.05.28
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Justina Fugh
Alternate Designated Agency Ethics Official
and Director, Ethics Office

cc: Benita Best-Wong, Deputy Assistant Administrator, Office of Water
Jennifer McLain, Director, Office of Ground Water and Drinking Water
Yu-Ting Guilaran, Deputy Director, Office of Ground Water and Drinking Water
Anita Thompkins, Director, Drinking Water Protection Division
Michael Plastino, Chief, Infrastructure Branch